REPLY BRIEF FOR PETITIONER

Supreme Court of the United States

OCTOBER TERM, 1956

No. 35

CHARLES ROWOLDT, *Petitioner,*

v.

J. D. PERFETTO, Acting Officer in Charge, Immigration and Naturalization Service, Department of Justice, St. Paul, Minnesota

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

DAVID REIN
JOSEPH FORER
Attorneys for Petitioner.

INDEX

Cases Cited

Supreme Court of the United States

OCTOBER TERM, 1956

No. 34

CHARLES ROWOLDT, *Petitioner*,

v.

J. D. PERFETTO, Acting Officer in Charge, Immigration and Naturalization Service, Department of Justice, St. Paul, Minnesota

---

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

---

REPLY BRIEF FOR PETITIONER

I. Petitioner Was Only a Nominal Member and Hence Not Deportable

A. The government recognizes that Galvan established a caveat as to the nature of deportable membership under the statute involved here (Govt. Br. 15). It deprives that caveat of any significance, however, by equating this Court's concept of "nominal" membership with unknowing or unconscious membership (Govt. Br. 33). *Galvan* plainly establishes, however, that one may have been a conscious member of the

Communist Party and still have had a relationship with the Party so "nominal" as not to come within the Act (at 528-9). Moreover, the government throughout its brief ignores the distinction made in *Galvan* between knowledge of unlawful advocacy, which *Galvan* held was not a prerequisite of deportability, and knowledge of the nature of the Communist Party as a distinct and active political organization, which it held was a prerequisite (at 528).

B. Even within its own framework the government finds it necessary to distort the record in order to exclude Rowoldt's membership from the nominal category. As we pointed out in our main brief (p. 22), the sole evidence against the petitioner was his voluntary statement made in January, 1947. The government urges that the statement should be taken not as made, but as argumentatively interpreted.

Thus, the petitioner's assertion that he joined the Communist Party because "it seemed to me that it came hand in hand—the Communist Party and the fight for bread" (R. 26), is translated by the government to mean that "he joined, not out of his own economic necessity, but to participate in its activities" (Govt. Br. 17), and because he believed the "Party was the appropriate channel through which to seek social reforms and through which to secure ultimate economic benefits to society generally" (Govt. Br. 20). Petitioner's statement that "even in the few Communist meetings I attended, nothing was ever said about overthrowing anything. All they talked about was fighting for their daily needs. That is why we never thought much of joining those parties in those days" (R. 31), is translated into the following: Petitioner "did actively par-

ticipate in the councils of the Party" (Govt. Br. 17) and "attended party meetings where party policy in regard to the economic situation was discussed" (Govt. Br. 18). Petitioner's statement that he was "kind of a salesman" in the Communist Party bookstore "for a while" (R. 28-29) means to the government that petitioner "was chosen by the Party to operate its bookstore in Minneapolis, Minnesota" (Govt. Br. 18). The petitioner's rambling and discursive discourse on the subject of Communism which discloses a rather incoherent and certainly unorthodox approach to the subject reveals to the government an "acquaintance with the Party classics (apparently relating back to the period of his membership)" (Govt. Br. 18, 28-29).[1] And the statement of the petitioner that "all they [the Communists] talked about was fighting for the daily needs" (R. 31) becomes to the government an admission that he was "aware of the immediate political and economic objectives of the Party in meeting the depression problems at hand" (Govt. Br. 29).

C. The government's brief is a vivid demonstration of the need at a minimum to remand this case to the Service for determination of the issue of whether petitioner was or was not a nominal member. The government argues that the case should not be remanded since there is no dispute as to the basic facts (Govt. Br. 35). It is true that the text of petitioner's voluntary statement, which is the sole evidence against him, is undisputed. But the inferences to be drawn from the state-

[1] Although the government makes this point twice in its brief, it does not indicate in either instance, why this is apparent. It is certainly not apparent from petitioner's statement.

ment are certainly at issue. The government in fact devotes a major portion of its brief in arguing the inferences to be drawn.

The arguments and considerations now advanced by the government, are being made for the first time and were never considered or evaluated by the Service. Petitioner is entitled to the considered judgment of the Service on the facts and the inferences to be drawn, not to an argumentative assertion in this Court as to what the Service might have done if it had considered the question. The Service found only that the petitioner "has been a member of the Communist Party" and that therefore his "deportation from the United States is mandatory." (R. 11). It gave no consideration to whether that membership was nominal or not. And the government, as we have seen, even now has an erroneous concept of what nominal membership means. The Service could not have resolved the issue either on the basis of the considerations now advanced by the government or on a correct basis, since it did not consider the question at all.

The government's contention that this Court should nevertheless determine the issue of nominal membership as a court of first instance, is against settled principles. In *National Labor Rel. Bd.* v. *Virginia Elec. & Power Co.*, 314 U. S. 469, 476, the Court said:

> "The command of § 10(e) of the [National Labor Relations] Act that 'the findings of the Board as to the facts, if supported by evidence, shall be conclusive' precludes an independent consideration of the facts. Bearing this in mind we must ever guard against allowing our views to be substituted for those of the agency which Congress has created to administer the Act. But here

> the Board's conclusion that the Independent was a Company dominated union seems based heavily upon findings which are not free from ambiguity and doubt. We believe that the Board, and not this Court, should undertake the task of clarification."

See also *Securities and Exchange Comm. v. Chenery Corp.*, 319 U. S. 80:

> "If an order is valid only as a determination of policy or judgment which the agency alone is authorized to make and which it has not made, a judicial judgment cannot be made to do service for an administrative judgment. For purposes of affirming no less than reversing its orders, an appellate court cannot intrude upon the domain which Congress has exclusively entrusted to an administrative agency." (at 88.)
>
> "But the difficulty remains that the considerations urged here in support of the Commission's order were not those upon which its action was based." (at 92.)

The government argues further that "it cannot be assumed . . . that the immigration authorities . . . would have failed to consider his [the petitioner's] claim to 'nominal' membership had it been fairly presented" (Govt. Br. 36). But the controlling fact is that the Sevice did not consider the problem, not why it did not. If, as this Court held in *Galvan*, the petitioner is deportable under the statute only if his membership was more than nominal, then the Service was not justified in issuing the deportation order absent the requisite finding. The fact that the petitioner and his counsel may have been, like the Service, deficient in understanding the requirements for a valid order of

deportation does not remedy the failure of the Service to make the necessary finding.

II. The Unconstitutionality of the Statute

The government argues that we misread the holding in *Galvan* as upholding the power of Congress to expel aliens for causes which have no rational relationship to their desirability as residents. It apparently agrees with our contention (Br. p. 42-48), that deportation statutes should be upheld by this Court only if they constitute a reasonable classification of currently undesirable aliens (See Govt. Br. p. 41). But if this be so, then clearly the Court should now re-examine the statute on that test; for manifestly it did not do so in *Galvan*. On the contrary, the Court intimated that by that test the statute could not survive. Thus the Court said at 530: "If due process bars Congress from enactments that shock the sense of fair play—which is the essence of due process—one is entitled to ask whether it is not beyond the power of Congress to deport an alien who was duped into joining the Communist Party, particularly when his conduct antedated the enactment of the legislation under which his deportation is sought." Yet the Court neither asked nor answered this question because in its view the "slate was not clean" and the Due Process Clause *did not* "qualif[y] the scope of political discretion heretofore recognized as belonging to Congress in regulating the entry and deportation of aliens" (at p. 531).

Accordingly, if we and the government are right, and the due process clause does qualify the deportation power so as to require a reasonable classification of undesirable aliens, *Galvan* is wrong and must be abandoned. We are satisfied that, as demonstrated in

our brief, the statute tested under the standard which the government now accepts is clearly unconstitutional. Furthermore, the statute, once it is tested against orthodox constitutional standards, is also, as demonstrated in our brief, in conflict with the First Amendment and the ex post facto and bill of attainder clauses.[2]

Finally, if the statute is to be tested against the standard of a reasonable classification of undesirable aliens, then it is clearly invalid as applied to the petitioner here. It is irrational to conclude from the fact that the petitioner twenty years ago was active in a movement for relief of the unemployed that he is therefore an undesirable resident today.

Respectfully submitted,

DAVID REIN
JOSEPH FORER
Attorneys for Petitioner

---

[2] The government suggests that this Court should not reconsider *Galvan* because it was a "comprehensive" opinion (Br. p. 39). Whatever else may be said of *Galvan's* treatment of the constitutional issues involved, it certainly cannot be characterized as "comprehensive."